

STATE OF MICHIGAN
COURT OF APPEALS

In re Estate of JAMES MORRIS LANE, Deceased.

PETER N. RIGAS and PETER W. STEKETEE,

Petitioners-Appellants,

v

BARBARA A. CROW, Personal Representative of
the Estate of JAMES MORRIS LANE, Deceased,

Respondent-Appellee.

In re Estate of JAMES MORRIS LANE, Deceased.

PETER N. RIGAS and PETER W. STEKETEE,

Petitioners-Appellees,

v

BARBARA A. CROW, Personal Representative of
the Estate of JAMES MORRIS LANE, Deceased,

Respondent-Appellant.

UNPUBLISHED
February 19, 2004

No. 240128
Kent Probate Court
LC No. 00-170126-DA

No. 241741
Kent Probate Court
LC No. 00-170126-DA

Before: Murray, P.J., and Murphy and Markey, JJ.

PER CURIAM.

In Docket No. 240128, petitioners, Peter N. Rigas and Peter W. Steketee, appeal as of right from the probate court's order allowing only a portion of their claim against the Estate of James Morris Lane, Deceased. Petitioners provided legal services to the decedent, Lane, in a civil lawsuit against his former girlfriend, Elizabeth Bianchi, before his death. After the decedent died, petitioners filed a claim against his estate for recovery of outstanding legal fees in the amount of \$65,348. Following a bench trial, the probate court awarded petitioners \$37,447

against the estate, less amounts already paid to petitioners, plus interest. In Docket No. 241741, respondent appeals as of right from the probate court's order denying the estate's subsequent motion for actual costs under MRE 2.405. In Docket No. 240128, we affirm in part, reverse in part, and remand for recalculation of the attorney fee amount allowed against the estate. In Docket No. 241741, we reverse, in part, the probate court's order denying actual costs under MCR 2.405, and remand for entry of costs consistent with this opinion.

I

In Docket No. 240128, petitioners challenge several of the probate court's findings of fact and further allege that it improperly applied MRPC 1.5(a) when deciding their claims.

The decision to allow or disallow a claim against an estate is reviewed for an abuse of discretion. See *In re Baird Estate*, 137 Mich App 634, 639; 357 NW2d 912 (1984). Findings of fact made by a probate court sitting without a jury will not be reversed unless they are clearly erroneous. *In re Erickson Estate*, 202 Mich App 329, 331; 508 NW2d 181 (1993). A finding is clearly erroneous if this Court is left with a definite and firm conviction that a mistake has been made. *Id.* We defer to the probate court on matters of credibility and give broad deference to its findings "because of its unique vantage point regarding witnesses, their testimony, and other influencing factors not readily available to the reviewing court." *Id.*

Petitioners first argue that the probate court erroneously determined that Lane was mentally incompetent and incapable of entering into contracts to hire them as his attorneys. Our review of the record and the probate court's well-reasoned and detailed opinion reveals that the court made no such finding. Rather, the court found that Lane's mental status was compromised at the outset of the underlying litigation and deteriorated throughout. This finding is supported by the evidence.

Petitioners next challenge the probate court's factual finding that Lane did not have sufficient information to make prudent decisions about continuing the underlying litigation in light of the significant, mounting legal bills. Again, we conclude that this finding is supported by the evidence. The record supports the trial court's finding that Lane did not have sufficient information to make an informed decision to continue the underlying litigation in light of the anticipated recovery and the costs and fees necessary to continue.

Petitioners also challenge the probate court's finding that there was no exigency with respect to the underlying litigation. The court ruled that there was no urgent time pressure to complete the underlying litigation because, if Lane died before the conclusion of the litigation, the estate could have pursued the case. On appeal, petitioners argue that the estate could not have pursued the underlying litigation. Their cursory argument is unsupported by citation to any authority, and this Court will not look for authority to support petitioners' claim. *Houghton v Keller*, 256 Mich App 336, 339-340; 662 NW2d 854 (2003). In any event, we note that both petitioners' expert witness and respondent's expert witness testified in the probate trial that time limitations were not a factor in the underlying litigation. Thus, the trial court's finding that an urgent time factor did not exist is not clearly erroneous.

Lastly, petitioners challenge the probate court's finding that Lane was billed for the duplicative efforts of Steketee and Rigas. Again, our review of the record discloses that this finding is not clearly erroneous as there was evidentiary support for the court's conclusion.

In addition to challenging the several findings of fact discussed above, petitioners argue that the probate court made mistakes in applying MRPC 1.5(a) to the facts of the case. MRPC 1.5(a) governs a determination of the reasonableness of a claimed attorney fee. *Jordan v Transnational Motors, Inc*, 212 Mich App 94, 97; 537 NW2d 471 (1995). A court's finding on the reasonableness of an attorney fee will be upheld unless it is an abuse of discretion. *Id.* A party claiming compensation bears the burden of proof with respect to reasonableness. *Bolt v Lansing (On Remand)*, 238 Mich App 37, 60-61; 604 NW2d 745 (1999); *In re Krueger Estate*, 176 Mich App 241, 249; 438 NW2d 898 (1989).

MRPC 1.5(a) provides:

A lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee. A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee. The factors to be considered in determining the reasonableness of the fee include the following:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent.

"The weight to be given the factors requires exercise of discretion by the trial court." *Dep't of Transportation v Randolph*, 461 Mich 757, 766 n 11; 610 NW2d 893 (2000).

Petitioners argue that the probate court's erroneous factual findings essentially excluded consideration of MRPC 1.5(a)(8) and MRPC 1.5(a)(5). We reiterate that the challenged findings of fact are not clearly erroneous. More importantly, our review of the probate court's written opinion reveals that the court considered each of the necessary factors in detail. Therefore, we find no merit to petitioners' claim in this regard. Further, we conclude that petitioners' cursory arguments with respect to MRPC 1.5(a)(1) and (7) are abandoned because their positions are not

explained or rationalized and are not supported by citation to authority. *Houghton, supra* at 339-340. In any event, we have reviewed the probate court's findings with respect to those factors and agree that they are not clearly erroneous or based on improper considerations. In sum, we conclude that the probate court specifically and properly considered all of the factors listed in MRPC 1.5(a). It did not abuse its discretion in concluding, based on its review, that the fees claimed by petitioners in conjunction with the underlying litigation were unreasonable in light of all of the facts and circumstances.

We also conclude that the probate court did not abuse its discretion in determining that a reasonable fee owed to petitioners was one-third of the result obtained after separately accounting for Gilbert's fees. During the eighteen-month period that the underlying litigation was pending, there was a four-day trial, four depositions, one formal motion, mediation, and only nine court appearances, including the four days spent in trial. There was evidence that the complex financial issues were unraveled principally by Gilbert, not petitioners, and his fees were separately allowed against the estate. Petitioners were compensated in a total amount close to that individually claimed by each. Given that there was testimony that one attorney probably could have handled the case, the amount of attorney fees awarded against the estate by the probate court is not grossly contrary to fact or logic. There was no abuse of discretion.

II

In Docket No. 240128, petitioners additionally argue that the probate court erred in calculating the one-third contingent fee that it awarded to petitioners. The probate court's calculation of a reasonable attorney fee will be upheld unless it appears to have been an abuse of discretion. *Jordan, supra* at 97. The probate court's findings of fact are reviewed for clear error. *Erickson Estate, supra* at 331.

There was no contingent fee calculation in this case and MCR 8.121(C), which governs contingent fee arrangements in personal injury and wrongful death cases, does not apply. The probate court did not substitute a traditional contingent fee arrangement for the hourly fee arrangements in this case, and it did not attempt to engage in a contingent fee calculation. Thus, it is unnecessary to address any arguments related to the calculation of a contingent fee under MCR 8.121(C).

The probate court determined that a reasonable attorney fee, based on the facts and circumstances, was the equivalent of one-third of the total recovery in the underlying litigation after Gilbert's expert fees were considered. The trial court then determined as fact that the total recovery in the underlying lawsuit was \$131,253. We conclude that this finding is clearly erroneous because the probate court failed to account for approximately \$13,000 that was secured by petitioners in the underlying litigation. The four recovered properties were valued at \$107,210 at the time of the underlying litigation. Cash in the amount of \$24,043 was also recovered. These amounts together total \$131,253. When the cash proceeds were paid over to Lane as part of the judgment, however, there was approximately \$1,000 in accrued interest that was also paid. The amount of interest should have been added to the total recovery in the underlying lawsuit where the evidence was undisputed that the interest was paid to Lane as part of the judgment. The interest was part of the total recovery.

In addition, the evidence at the probate trial established that \$12,000 in personal property was also recovered in the underlying lawsuit. At the time the complaint was filed in that case, a schedule of personal property that allegedly was wrongfully withheld by Bianchi was attached. Three of the items listed on that schedule were later turned over to Lane, including a truck valued at \$6,000, a ring valued at \$5,000, and an automobile valued at \$1,000. The judgment in the underlying litigation specifically awarded these items to Lane. While the items may not have been part of the estate after Lane's death, this does not diminish that they were recovered because of the underlying lawsuit filed on Lane's behalf. Thus, we believe that the probate court erroneously failed to include the value of those items when calculating the total recovery in the underlying lawsuit. On remand, the probate court should add the amount of interest on the cash proceeds plus \$12,000 to the total recovery before subtracting Gilbert's fee and calculating the one-third amount awarded to petitioners.

We disagree with petitioners' remaining arguments with respect to the trial court's valuation of the underlying recovery. Specifically, we find no merit to petitioners' claims that the value of the real properties should have been modified based on information and facts that became known only after judgment in the underlying action was entered. While the probate court could have decided to value the real properties in a different manner, its decision not to do so will not be second guessed. There was evidence in the record to support that the four properties were valued, and believed to be worth, approximately \$107,000 at the time of the judgment in the underlying action. Consideration of the fees charged by petitioners in relation to that amount was appropriate. We emphasize that our standard of review is not whether the probate court could have reached a different decision, but whether it made erroneous findings of fact or ultimately abused its discretion. Its determination as to the value of the real properties is supported by the evidence, and the court did not clearly err in making that finding.

We also find no merit to petitioners' argument that estimated closing costs and commissions for the sale of the real properties should have been added to the values of those properties. When judgment was entered in the underlying litigation, the properties were valued based on the assumption that they would have to be sold. The net amount of recovery thus contemplated costs associated with sale.

III

In Docket No. 241741, respondent challenges the probate court's ruling denying her request for actual costs under MCR 2.405. Whether the probate court had discretion with respect to taxable costs and fees requires interpretation of MCR 2.405, which presents a question of law that is reviewed de novo. See *ISB Sales Co v Dave's Cakes*, 258 Mich App 520, 526; 672 NW2d 181 (2003). In addition, a decision with respect to attorney fees under MCR 2.405 is reviewed for an abuse of discretion. *J C Building Corp II v Parkhurst Homes, Inc*, 217 Mich App 421, 426; 552 NW2d 466 (1996).

MCR 2.405(D) provides, in relevant part:

If an offer is rejected, costs are payable as follows:

(1) If the adjusted verdict is more favorable to the offeror than the average offer, the offeree must pay to the offeror the offeror's actual costs incurred in the prosecution or defense of the action.

* * *

(3) The court shall determine the actual costs incurred. The court may, in the interest of justice, refuse to award an attorney fee under this rule.

The plain language of MRE 2.405(D) indicates that the probate court had discretion to deny attorney fees. It did not, however, have discretion to deny taxable costs and other fees. In *Luidens v 63rd Dist Court*, 219 Mich App 24, 30; 555 NW2d 709 (1996), this Court recognized that MCR 2.405(D) distinguishes between taxable costs and fees and attorney fees, the latter being subject to the "interest of justice" exception. See also *Reitmeyer v Schultz Equip & Parts Co, Inc*, 237 Mich App 332, 338-339; 602 NW2d 596 (1999).

In this case, there is no dispute that the adjusted verdict was more favorable to the estate than the average offer of judgment. This proposition holds true even if the additional \$13,000 discussed in part II, *supra*, is included in the calculation of the attorney fee award to petitioners. The average offer of judgment was \$62,674. Because the "interest of justice" is inapplicable to taxable costs and fees under MCR 2.405, the probate court did not have the authority to deny those costs and fees on that basis.

With respect to taxable costs and fees, the probate court denied the request for payment of respondent's expert witness fee. Expert witness fees, however, are taxable under MCL 600.2164. *Luidens, supra* at 31. Respondent submitted a detailed bill from her expert. Her fees were itemized and were not vague, contrary to the probate court's finding. On remand, the probate court should award payment of the expert witness fee. We disagree, however, that respondent is entitled to the additional \$185 in costs that she seeks. The trial court denied payment of those costs on the ground that they were not itemized and were vague. We note that, while respondent properly cites statutory authority to support her position that the costs are taxable in civil actions, she has not substantiated that these costs were paid. Her request for these costs is indeed vague and unsupported. Accordingly, those costs were properly denied.

With respect to attorney fees incurred by the estate in defending against petitioners' claims, we conclude that the probate court did not abuse its discretion. "The purpose of imposing costs under MCR 2.405 is to encourage the parties to settle before trial." *Butzer v Camelot Hall Convalescent Ctr, Inc (After Remand)*, 201 Mich App 275, 278; 505 NW2d 862 (1993). In *Luidens, supra* at 31-37, this Court explored the "interest of justice" exception in great detail. Citing *Gudewicz v Matt's Catering, Inc*, 188 Mich App 639, 645; 470 NW2d 654 (1991), it confirmed that "absent unusual circumstances," the exception does not preclude an award of attorney fees. *Luidens, supra* at 32.

After carefully reviewing the explanation articulated by the probate court to deny an award of attorney fees under the "interest of justice" exception, along with review of the relevant factors to be considered under the exception as enunciated in *Luidens* and additional case law, we conclude that the court's ruling cannot be deemed "so palpably and grossly violative of fact and logic that it evidence[d] perversity of will, a defiance of judgment, or the exercise of passion

or bias.” *Barrett v Kirtland Community College*, 245 Mich App 306, 325; 628 NW2d 63 (2001). This case presented an unusual situation as indicated by the probate court in its ruling, wherein it stated that “had Mr. Rigas and Mr. Steketee not pursued a lawsuit on behalf of the decedent, James Lane, there would be no assets, probably no decedent estate, because he would have been penniless – maybe some small interest in real estate.” We find no abuse of discretion.

IV

In Docket No. 240128, we affirm in part, reverse in part, and remand for recalculation of petitioners’ claim based on the addition of approximately \$13,000 to the total recovery in the underlying lawsuit. In Docket No. 241741, we reverse the trial court’s order denying actual costs to the estate pursuant to MCR 2.405, but only to the extent discussed *supra*, and remand for entry of costs consistent with this opinion. We do not retain jurisdiction.

/s/ Christopher M. Murray

/s/ William B. Murphy

/s/ Jane E. Markey